IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-370

CITY OF PHILADELPHIA, *Respondents*

v.

JOSEPH F. KENNY, RAYMOND F. PERCIVAL, E. A. THOMAS, GUY W. HARVEY, JR., ABNER B. DECKERT, WILLIAM H. HAZZARD, JAMES W. SPROLES, JEROME L. NEWMAN, FREDERICK JENNINGS, GLORIA T. JONES, GEORGE V. SCHOCK, GEORGE J. CILONA, CHARLES H. CROSS, RONALD O. GAITHER, ARTHUR E. CORNELL, AND MEYER GOLDSTEIN

AND

GORDON MAC DONALD AND LAWRENCE ROCK, *Petitioners*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

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OPINION BELOW

Respondent accepts Petitioners description of the reporting of the opinion of the court below. However, Petitioners printed, as part of the Appendix to their Petition (as Appendix "A" thereof), only part of the opinion of the Commonwealth Court of Pennsylvania in the matter of *City of Philadelphia v. Kenny et al.* The *full* opinion of the Commonwealth Court in *City of Philadelphia v. Kenny*, appears as Appendix "A" hereto.

COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Where Defendants (Petitioners herein) in a civil suit for collection of delinquent wage taxes assert in their answer to the complaints their Fifth Amendment privilege against self-incrimination, may the court below draw an adverse inference therefrom?

COUNTER-STATEMENT OF THE CASE

The City of Philadelphia filed civil actions in assumpsit in the Court of Common Pleas of Philadelphia County against eighteen taxpayers, individually, your petitioners herein, for the collection of taxes due under the Philadelphia Wage and Net Profits Tax Ordinance.[1] The complaints are all similar. After identifying the City of Philadelphia as plaintiff, each complaint contained the following factual allegations:

1. The name, place of employment, Social Security number and City of Philadelphia Department of Revenue account number of each individual (see paragraph 2 of Complaint at B24 hereof);

2. The Council of the City of Philadelphia adopted a Wage and Net Profits Tax Ordinance (see paragraph 3 of Complaint at B24 hereof);

3. The Defendants failed to file or pay wage taxes in a specified amount together with interest and penalty (see paragraph 4 of Complaint at B24 hereof);

4. The Defendants had earnings during the years in question of a specified amount (see paragraph 5 of Complaint at B24 hereof);

5. Based upon the earnings information supplied to the City of Philadelphia by the federal agency employing each Defendant, the City of Philadelphia Department of Revenue made a wage tax assessment against these defendants, notified them thereof, and that each had failed to exhaust their statutorily prescribed administrative remedy of appeal by Petition for Review to the City of Philadelphia Tax Review Board.[2] (See paragraph 6 of Complaint at B25 hereof); and

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1. Philadelphia Code, §19-1500, et seq.
2. Philadelphia Code, §§19-1702, 1706.

6. The City of Philadelphia has made demands for payment from each Defendant (see paragraph 7 of Complaint at B25 hereof).

Each taxpayer filed an answer in which they denied the averments relative to their name, place of employment, social security number, Department of Revenue account number, and that he had earnings during the years in question of specified amounts upon the ground that admission thereto would be violative of their Fifth Amendment right against self-incrimination.

Each taxpayer further answered that: the Council of the City of Philadelphia did enact an ordinance imposing a Wage and Net Profits Tax but that said ordinance is unconstitutional as applied to him; he does not owe the City of Philadelphia any money; he is without sufficient knowledge as to how the City of Philadelphia made its tax assessment; and demands have been made for payment thereof but he has refused to pay said monies.

By way of New Matter, the Defendants averred that the actions were barred by the statute of limitations, and that the City's wage tax was unconstitutional under the Pennsylvania and the United States Constitution. As to all eighteen Defendants, the City denied these defenses in their Reply to New Matter.

Thereafter, the City moved for judgment on the pleadings in its actions against Defendants Thomas, Percival, Kenny, Hazzard, Harvey and Deckert. These cases were assigned to the Honorable Paul A. Dandridge, Judge of the Court of Common Pleas of Philadelphia County, who entered orders granting the City's Motion. In the actions against Defendants Sproles, Newman, Jennings, Jones, Schock, Goldstein, Cornell, Cilona, Cross, Gaither, MacDonald and Rock, the City moved for summary judgments. These cases were assigned to seven separate judges who each granted the respective motions. From the orders entering Judgment, the taxpayers appealed to the Common-

wealth Court which on February 8, 1977 and March 2, 1977, unanimously affirmed by Consolidated Opinions all of the judgments of the Court of Common Pleas. A timely Petition for allowance of appeal therefrom was filed with the Supreme Court of Pennsylvania which on June 27, 1977, denied said Petition.

As a result thereof, the instant Petition for Writ of Certiorari was filed with and docketed by this Honorable Court on September 8, 1977. The following brief is respectfully submitted in opposition thereto.

REASONS FOR DENYING WRIT

Where Defendants (Petitioners Herein) in a Civil Suit for Collection of Delinquent Wage Taxes Assert in Their Answer to the Complaints Their Fifth Amendment Right Against Self-Incrimination, the Court Below May Draw an Adverse Inference Therefrom.

1..This Court Has Previously Determined the Question of Reasonable Sanctions Upon a Defendant in Civil Litigation for Asserting His Fifth Amendment Privilege Therein.

It is indisputable that the Fifth Amendment privilege against self-incrimination is applicable to the states via the Fourteenth Amendment, and it applies to protect an individual not only from being compelled to testify against himself in a criminal prosecution, but also privileges him not to answer official questions in any proceeding, criminal or civil, where the answer might incriminate him in future criminal proceedings. *Lefkowitz v. Turley*, 414 U.S. 70, 77, 38 L.Ed. 2d 274, 94 S.Ct. 316 (1973). It is clearly the law of Pennsylvania that the prosecution for violation of a municipal ordinance is procedurally a civil case. *Philadelphia v. Konopacki*, 366 A.2d 608 (1976). However, as pointed out in their Petition at p.10, petitioners may well be subjected to future proceedings by the City for fines (or imprisonment for failure to pay the fine) for their failure to comply with the requirements of the Philadelphia Code. See Philadelphia Code §19-508(3). Due to their reasonable apprehension of such proceedings, petitioners were entitled to assert their Fifth Amendment privilege in the civil cases (See Opinion of court below at p.B8 hereof). See also *Lefkowitz v. Turley, supra.*

Petitioners contend next, however, that these consolidated cases present to this Honorable Court for its initial determination the question of what reasonable sanctions may be imposed upon a defendant in civil litigation who

rightfully invokes his Fifth Amendment privilege against self-incrimination.

This Honorable Court has recently addressed this exact issue in its decision of *Baxter v. Palmigiano*, 425 U.S. 308, 47 L.Ed. 2d 810, 96 S.Ct. 1551 (1976). While admittedly, the reasonable sanctions imposed in *Baxter* took place in a different setting (*i.e.* a prison disciplinary proceeding), the Court was very explicit in outlining the procedural safeguards to be followed in other cases wherein an adverse inference may be drawn from the assertion thereof in a civil case. It is respondent's contention that all these safeguards were maintained by the courts below; and that it was neither unreasonable nor does it result in any penalty to petitioners for the lower court to infer only that a truthful response to Paragraphs 2 and 5 of each of the City's complaints would fail to deny the allegations of identity and income.

The procedural safeguards set out in *Baxter*, which are all met in the case at bar, are: (1) No criminal proceedings were pending against the inmate (see Argument 2 hereof); (2) the state did not seek to make evidentiary use of his silence in any criminal proceeding, (see Argument 2 hereof); (3) the state did not insist or ask that the inmate waive his Fifth Amendment privilege (The Commonwealth Court in the instant case specifically held that petitioners herein were permitted to assert their Fifth Amendment privileges against self-incrimination; see lower court opinion at p.B8 hereof); (4) under state law, the inmate's election to remain silent did not result in his automatically being found guilty of the infraction with which he was charged and was not, by itself, sufficient to support an adverse decision (see Argument 3 hereof); (5) the inmate's silence was given no more evidentiary value than was warranted by the facts of the case (See lower court opinion at p.B12 hereof); and (6) in addition to the inmate's silence, the disciplinary board's adverse decision was based on investigative reports, copies of which had

been given to the inmate prior to the hearing, and on supplementary reports made by the officials who had filed the initial reports (see argument 3 hereof). For petitioners to contend that these cases present ones of first impression for this Honorable Court or that *Baxter* presents no more than a "tangential review" (Petition p.12) of this issue is completely fallacious. It is an elementary principle of law that a case's holding is necessarily circumscribed by its operable facts. Yet, it is entirely another thing to argue that the Supreme Court should grant a Writ of Certiorari to review a state court's application of that holding to a new set of facts merely because the facts of the cases now at bar do not involve prison disciplinary proceedings. This Court, after reviewing the propriety of the proceeding in *Baxter*, specifically concluded that the decision was "consistent with the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a *party to a civil cause*,'" citing 8 Wigmore, *Evidence* §439 (McNaugton rev. 1961) 425 U.S. at 318 (emphasis in original text).

It is clear that this Honorable Court was not setting a new precedent with its holding in *Baxter* concerning adverse inferences from invocation of Fifth Amendment rights. By citing Wigmore, and it should be noted the Commonwealth Court in its opinion cited that same source,[3] this Honorable Court was but merely confirming the decisions of the long list of jurisdictions[4] adopting the "pre-

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3. See Opinion of court below, p.B9 hereof.

4. *Kent v. United States*, 157 F.2d 1 (5th Cir.), *cert. denied*, 329 U.S. 785 (1946); *Paynes v. Lee*, 362 F. Supp. 797 (M.D. La. 1973), *aff'd*, 487 F.2d 1307 (5th Cir. 1974); *Stillman Pond, Inc. v. Watson*, 115 Cal. 2d 440, 252 P.2d 717 (Ct. App. 1953); *Simpson v. Simpson*, 233 Ga. 17, 209 S.E. 2d 611 (1974); *Allen v.*

vailing rule." The Commonwealth Court of Pennsylvania has now concluded that "the rule enunciated in the cited authorities[5] is sound, and we adopt it."[6] But petitioners would have this Honorable Court believe the Commonwealth Court imposed a constitutionally impermissible sanction on petitioners' assertion of their Fifth Amendment rights; that it was somehow in error in adopting the "prevailing view"; and that this Honorable Court's decision in *Baxter* has not settled this area of the law. Respondent contends, to the contrary, *Baxter* was but the *'coup de grace'* on this issue.

Following are four examples thereof. In *Kent v. United States*, 157 F.2d 1 (5th Cir. 1946), *cert. den.*, 329 U.S. 785 (1946), an adverse inference was properly drawn in a case wherein a claimant refused to testify in forfeiture proceedings brought by the United States to confiscate distilled spirits. In *Ralph Hegman Co. v. Transamerican Insurance Co.*, 293 Minn. 323, 198 N.W.2d 555 (1972), an employer brought suit against a surety on a fidelity bond written on one of plaintiff's employees. On deposition prior to trial, the employee invoked the Fifth Amendment privilege to questions relating to his alleged dishonesty or fraud. At trial against the surety, the deposition was introduced into evidence to support the claim under the terms of the bond. Appellant argued the use of the deposition prejudiced its case by presenting nonevidence from which

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Note 4—*Continued*
Lindeman, 259 Iowa 1384, 148 N.W. 2d 610 (1967); *Ralph Hegman Co. v. Transamerica Insurance Co.*, 293 Minn. 323, 198 N.W. 2d 555 (1972); *Morgan v. U.S. Fidelity and Guaranty Co.*, 222 So.2d 820 (Miss.), *cert. denied*, 396 U.S. 842 (1969); *Harwell v. Harwell*, 355 S.W. 2d 137 (Mo. App. 1962); *Mahne v. Mahne*, 66 N.J. 53, 328 A.2d 225 (1974); *In Re Tesch*, 322 N.Y.S. 2d 538, 66 Misc. 2d 900 (1971); *Ikeda v. Curtis*, 43 Wash. 2d 449, 261 P.2d 684 (1953); *Molloy v. Molloy*. 46 Wisc. 2d 682, 176 N.W. 2d 292 (1970).

5. See footnote 4 hereof.
6. See opinion below at page B9 hereof.

the jury should not have been permitted to draw adverse inferences. The Court held:

> "If the jury could properly have been permitted to draw inferences in favor of plaintiff against (employee) because of his assertion of privilege or its claim against him, there seems no sound reason why the jury should not be permitted to draw the same inferences . . . against appellant." 198 N.W. 2d at 557.

In *Simpson v. Simpson*, 233 Ga. 17, 209 S.E. 2d 611 (1974), a wife asserted the Fifth Amendment in a custody case to questions relating to alleged illicit conduct. The Supreme Court of Georgia held that the inference that the wife and a third party witness were guilty of said illicit conduct could be drawn from their refusal to testify. In a fourth factual setting, the Second Circuit held the SEC, in a registration revocation proceeding, could properly consider an individual's failure to testify in respect to matters urged against him, repeating the accepted rule that failure to explain facts and circumstances warrants the inference that his testimony would have been adverse. *N. Sims Organ & Co. v. SEC*, 293 F.2d 78 (2nd Cir. 1961). Respondent could continue to cite numerous other factual situations wherein an adverse inference was drawn from an invocation of Fifth Amendment rights in a civil case. However doing so is unnecessary since petitioners' argument that *Baxter* is inapplicable solely on the ground that it concerned prisoner's rights, has been adequately refuted.

The interest of the general public in the fair adjudication by courts of civil disputes between citizens ranks very high in the American polity. The permissible drawing by the factfinder of an inference of inability to truthfully deny a civil claim from a defendant's failure to testify as to relevant facts within his personal knowledge which might refute the evidence adduced against him, is a logical, traditional, and valuable tool in the process of fair adjudi-

cation. It subserves private justice. It does not impair the privilege against self-incrimination. *Duratron Corp. v. Republic-Stuyvesant Corp.*, 95 N.J. Super. 527, 533, 231 A.2d 854, 857 (1967).

Accordingly it is respectfully submitted that the decision of this Honorable Court in *Baxter* is controlling on the issues herein thereby precluding any need for further review by this Court.

2. In the Instant Litigation, Petitioners Are Improperly Anticipating an Impermissible Future Use of Adverse Inferences Drawn Herein.

The decision of the Commonwealth Court of Pennsylvania, insofar as the drawing of an adverse inference from the assertion by petitioners herein of their Fifth Amendment right against self-incrimination in their answer to respondent's complaint, is consistent with and supported by prior decisions of this Honorable Court. See *Lefkowitz v. Turley, supra* and cases cited therein.

In *Lefkowitz*, a contractor with the City of New York asserted his Fifth Amendment right against self-incrimination in a criminal investigation of conspiracy, bribery and larcency charges. Pursuant to the provisions of local law, the city and municipal authorities were advised thereof and were requested to terminate all contracts with that contractor and disqualify him from consideration from future contracts for five years. The contractor thus brought an action to eliminate this threat to present and future contracts on the basis that such action constituted coercion to waive the contractor's Fifth Amendment rights, citing *Garrity v. New Jersey*, 385 U.S. 493, 17 L.Ed. 2d 562, 87 S.Ct. 616 (1967) and *Gardner v. Broderick*, 392 U.S. 273, 20 L.Ed. 2d 1082, 1182, 88 S.Ct. 1913 (1968). In so holding, this Honorable Court stated:

> "We should make clear, however, what we have said before. Although due regard for the Fifth Amendment

> forbids the State to compel incriminating answers from its employees and contractors that may be used against them in criminal proceedings, *the Constitution permits that very testimony to be compelled if neither it nor its fruit are available for such use.*" 414 U.S. at 84, 38 L.Ed. 2d at 285 (emphasis added).

It is thus clear that petitioners herein could be compelled to either answer respondent's complaint or, if they maintain their assertion of their Fifth Amendment privilege, have the court draw an adverse inference therefrom in a civil proceeding, if neither the inference (or compelled answer) nor the fruits thereof, are used in any additional criminal or quasi-criminal proceeding. This view was also adopted by the lower court herein where it held that:

> "There is much authority for the proposition that, while a defendant in a civil case [as the instant case is] may invoke the privilege and it may not be used against him in any way in a *subsequent criminal prosecution*, the court in the *civil case* may draw any adverse inference which is reasonable from the assertion of the privilege" [citations omitted]. 369 A.2d at 1349 (emphasis in original text)

The argument which petitioners herein make is thus clearly premature. Petitioners herein are assuming that in any subsequent criminal (or quasi-criminal) proceeding, respondents will seek to use any compelled admissions, adverse inference or the fruits thereof against them. Such conduct would clearly be in violation of the Commonwealth Court's express restriction in this very case. See also *Baxter, supra*, wherein this restriction is in complete conformity with the guidelines set forth by this Honorable Court. The proper time for petitioners to raise their question would be if and when the respondent sought to use these facts against them in any subsequent criminal (or quasi-criminal) proceeding. See *Garrity, supra*, wherein this Honorable Court reversed criminal convictions of de-

fendants therein due to the fact that said convictions were the result of the use by the state of testimony coerced from Defendants in a prior proceeding in violation of their Fifth Amendment rights against self-incrimination. Such coercion constituted the threat of loss of their jobs if they asserted their Fifth Amendment rights.

In support of their position, petitioners rely upon *Gardner, supra; Garrity, supra; Lefkowitz, supra,* and *Spevack v. Klein*, 385 U.S. 511, 17 L.Ed. 2d 574, 87 S.Ct. 625 (1967). Notwithstanding the foregoing, it should be noted that each of these cases is factually distinguishable. One common thread appears in *Gardner, Garrity* and *Lefkowitz*. In each of these cases, the Fifth Amendment was not asserted in a civil case, it was asserted in a *criminal investigation* (refusal to testify by municipal employee before a grand jury investigating municipal corruption, *Gardner;* refusal to testify by a municipal contractor in an investigation of conspiracy, bribery and larcency charges, *Lefkowitz;* and refusal to testify by government employees in an investigation of alleged traffic ticket fixing, *Garrity*); whereas, in the instant case, the refusal to answer is admittedly in a pure civil suit for collection of delinquent taxes. In *Spevack*, an attorney was subpoenaed to produce books and records and give testimony in a judicial inquiry. He refused to do so—asserting his Fifth Amendment rights. An action was then instituted seeking his disbarment. The issues involved therein were: (1) whether this Honorable Court's decision in *Cohen v. Hurley*, 366 U.S. 117, 6 L.Ed. 2d 156, 81 S.Ct. 954 (1961) had survived *Malloy v. Hogan*, 378 U.S. 1, 12 L.Ed. 2d 653, 84 S.Ct. 1489 (1964); (2) use of the assertion of the Fifth Amendment in a subsequent proceeding; and (3) applicability of the Fifth Amendment to production of books and records. The issue of the severity of the penalty being imposed was not at issue. The only reference made by this Honorable Court to the severity of the penalty was as to the over-

ruling of *Cohen v. Hurley* in light of *Malloy v. Hogan;* thereby extending the Fifth Amendment protection to lawyers in disbarment proceedings. It should again be noted that here too this Honorable Court acted not in the action in which the Fifth Amendment was asserted, but in the subsequent action wherein use thereof was attempted against the individual asserting it.

Accordingly, it is respectfully submitted that the decision of the Commonwealth Court of Pennsylvania restricting the use of adverse inference to the specific civil proceeding involved precludes further use thereof and cannot be a violation of petitioners' constitutional protections.

3. Use of Adverse Inference by the Court Below From the Assertion of Fifth Amendment Rights Neither Automatically Enter Judgment Against Petitioners nor Obviated Respondents' Requirement of Meeting the Burden of Proof.

Petitioners argue that the court below imposed automatic penalties against them for their assertion of the privilege against self-incrimination in violation of the principles established by this Court in *Garrity, Gardner* and *Lefkowitz*. This argument clearly misrepresents the actions taken by the lower court in response to the invocation of the Fifth Amendment by petitioners.

In each of its complaints against the respective petitioners, the City, among other averments, alleged the name, social security number, account number, place of employment, years of employment and earnings for each Petitioner. All of the aforesaid allegations were responded to by each petitioner by the assertion of the privilege against self-incrimination. The other averments in the City's complaints included the following allegations that the petitioners failed to file City Wage Tax returns; that they did not pay the taxes itself and that a balance of taxes plus interest and penalties were due; that the City

made assessments against the petitioners for the taxes; that petitioners were notified of the assessments; that petitioners failed to appeal the assessment with the Philadelphia Tax Review Board; that the City has made demands for payments of the taxes; and that the petitioners have not made payment.

In their answers to the complaints, the petitioners denied all of the above-mentioned allegations on a basis other than by asserting their Fifth Amendment rights.

With respect to the petitioners' invocation of the Fifth Amendment in response to certain allegations made by the City, the court below drew the negative inference that a truthful response to the allegations would fail to deny same. Thus, the court judged that those averments responded to by the assertion of the privilege against self-incrimination were to be deemed admitted. The court did not then automatically render judgment against the petitioners but then viewed the other allegations in the complaint and the responses made thereto by the petitioners to see if any issues of fact remained. After examining same, the Court determined that the Petitioners had not denied any of the other allegations in accordance with the Pennsylvania Rules of Civil Procedure, and, that consequently, said allegations should likewise be deemed admitted. (See lower court opinion at p. B11 hereof.) Therefore, since all the City's allegations were considered admitted and no issues of fact existed, the lower court embarked upon an examination of all questions of law raised therein and only after ruling thereon granted judgments in favor of City and against the petitioners.

From the foregoing account, it can be clearly seen that judgments were not rendered against the petitioners for their assertion of the Fifth Amendment. A mere negative inference to some of the answers to the allegations in the City's complaint was drawn. If petitioners had either made proper denials to the City's other averments, or otherwise raised issues of fact or questions of law which were nec-

essary for the City to prove to entitle it to relief, issues would have remained, notwithstanding the drawing of the negative inference, and neither judgment on the pleading nor summary judgment would have been appropriate. Therefore, petitioners' attempt to characterize what the lower court did as the automatic imposition of sanction upon them for their invocation of the privilege against self-incrimination is nothing but an attempt to distort facts herein to fall within the *Garrity, supra; Gardner, supra,* and *Lefkowitz, supra,* guidelines and should be summarily rejected by this Court. See also *Baxter, supra,* for conformity to the guidelines heretofore fixed by this Honorable Court.

Contrary to the position presently taken by petitioners, the actions of the lower court did not allow the City to win its case by forfeiture or without meeting its burden of proof. In every motion for summary judgment, the crucial question is whether there is a genuine issue as to any material fact. On this crucial issue, the moving party has the burden of convincing the Court that there is no genuine issue of fact and all doubts on this question are to be resolved against the granting of the Motion. *Prince v. Pavoni,* 229 Pa. Super. 286, 302 A.2d 492 (1973). Likewise, judgments may be entered on the pleadings; only in clear cases, where there are no issues of fact, and only where the case is so clear that a trial would be a fruitless exercise [Goodrich-Amram 2d §1034(a)(1), at 397].

In the case at bar, the principles set out above were not neglected. The fact that the Court drew negative inferences to some of the City's allegations because of petitioners' invocation of the Fifth Amendment did not establish the City's entire case. It was necessary for the City to go beyond those allegations deemed admitted and establish other facts before it was entitled to judgment. This burden was met by the City, for both in its motions for summary judgment and judgment on the pleadings, the City proved to the satisfaction of the court below that

no unresolved questions of material facts remained for trial.

Petitioners cite the case of *Mahne v. Mahne*, 66 N.J. 53, 328 A.2d 225 (1974) and quote therefrom for the purpose of showing how the lower court in the instant case contravened the principles of due process. Notwithstanding petitioners' analysis, *Mahne* stands for the proposition that a court in a civil case may not impose an unduly harsh sanction upon a defendant for his assertion of the privilege against self-incrimination. In *Mahne*, the trial court struck the Defendants Answer to the Plaintiffs Complaint for the former's invocation of the Fifth Amendment in response to certain interrogatories. The Supreme Court of New Jersey, although in acknowledging the propriety of imposing sanctions upon the defendant, determined that the lower court's action was unnecessarily extreme.[7]

In the present case, the court below imposed a considerably lesser penalty on the petitioner than was applied on the defendant in *Mahne*. In spite of the fact that negative inferences were drawn by the Court to some of the City's allegation, other facts had to be proven by the City to the Court's satisfaction before judgment was rendered. In *Mahne*, the lower court by striking the defendants answer left her in the position of a defaulting party. She, in essence, automatically lost the litigation involved therein upon her invocation of the Fifth Amendment. Thus, the lower court's action in the case at bar is not at all inconsistent with the holding in *Mahne*. Indeed, the court below by applying a moderate and fair penalty on the petitioners for their invocation of the Fifth Amendment in a civil case adhered wholly to the principles of *Mahne*, wherein the Court stated that there are available:

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7. "While we agree that noncriminal sanctions were permissible we reject his choice of sanction." *Mahne*, 327 A.2d at 226.

> "Broad choices of sanctions when dealing with good faith exercises of the privilege in civil litigation. Proper balances are the goal and trial courts must seek those sanctions which are best designed to protect the pertinent public and private interests without impairing the historic designs of the privilege." 328 A.2d at 229

Finally, petitioners also argue that use of the adverse inference in a pre-trial proceeding from the assertion of Fifth Amendment rights is improper. However, that is not the instant case. The adverse inference was drawn in a proceeding which, after proof of all other material facts and resolution of all questions of law, yielded entry of a final judgment. Clearly, the proceeding herein was in essence not pre-trial but in lieu thereof. Since petitioners did not present to the lower court any factual, material issues, there was nothing for the court to decide at trial. Consequently, a ruling was made of the legal issues present therein and judgment entered thereon.

Accordingly, it is respectfully submitted that in the instant case, judgment was not automatically entered as a result of the assertion of Fifth Amendment rights; that respondent was still required to meet its burden of proof as to all material facts as well as establish its right to judgment as a matter of law; that use of the adverse inference herein was not in effect pre-trial use thereof but due to petitioners failure to raise any material factual issues in lieu thereof; and that the non-criminal sanction imposed by the Court below was not harsh and was thereby consistent with all requirements of due process.

CONCLUSION

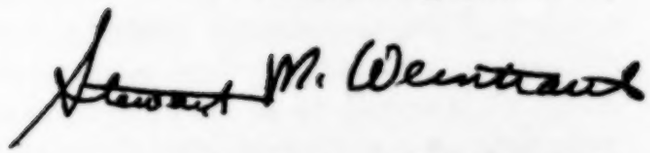
It is respectfully submitted that for the reasons set forth in this brief, this Honorable Court should not grant petitioner's request for further review of the decision of the Commonwealth Court of Pennsylvania. The issue raised herein has already been addressed by this Court and decided in manner which was followed by the lower Court herein.

WHEREFORE it is respectfully requested that the Petition for Writ of Certiorari to the Commonwealth Court of Pennsylvania filed by petitioners herein be denied.

Respectfully submitted,

Sheldon L. Albert
City Solicitor

Augustus L. Pasquarella
Assistant City Solicitor



By: Stewart M. Weintraub
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Counsel for Respondents

Appendix A

IN THE
COMMONWEALTH COURT OF PENNSYLVANIA

CITY OF PHILADELPHIA
v.
JOSEPH F. KENNY, *Appellant* — No. 409 C. D. 1975

CITY OF PHILADELPHIA
v.
RAYMOND F. PERCIVAL, *Appellant* — No. 410 C. D. 1975

CITY OF PHILADELPHIA
v.
E. A. THOMAS, *Appellant* — No. 411 C. D. 1975

CITY OF PHILADELPHIA
v.
GUY W. HARVEY, JR., *Appellant* — No. 412 C. D. 1975

CITY OF PHILADELPHIA
v.
ABNER B. DECKERT, *Appellant* — No. 413 C. D. 1975

CITY OF PHILADELPHIA
v.
WILLIAM H. HAZZARD, *Appellant* — No. 414 C. D. 1975

CITY OF PHILADELPHIA
v.
JAMES SPROLES, *Appellant* — No. 653 C. D. 1975

CITY OF PHILADELPHIA
v.
JEROME L. NEWMAN, *c/o*
Defense Personnel Center
JEROME L. NEWMAN, *Appellant* — No. 734 C. D. 1975

CITY OF PHILADELPHIA
v.
FREDERIC JENNINGS, *Appellant* — No. 735 C. D. 1975

Appendix A (Continued)

CITY OF PHILADELPHIA
v.
GLORIA T. JONES, *c/o* Defense Personnel Center — No. 736 C. D. 1975
GLORIA T. JONES, *Appellant*

CITY OF PHILADELPHIA
v.
GEORGE V. SCHOCK, *c/o* Defense Personnel Center — No. 738 C. D. 1975
GEORGE V. SCHOCK, *Appellant*

CITY OF PHILADELPHIA
v.
GEORGE J. CILONA, *Appellant* — No. 959 C. D. 1975

CITY OF PHILADELPHIA
v.
CHARLES H. CROSS, *Appellant* — No. 960 C. D. 1975

CITY OF PHILADELPHIA
v.
ARTHUR E. CORNELL, *Appellant* — No. 1239 C. D. 1975

CITY OF PHILADELPHIA
v.
MEYER GOLDSTEIN, *Appellant* — No. 1240 C. D. 1975

BEFORE:

HONORABLE JAMES S. BOWMAN, President Judge
HONORABLE JAMES C. CRUMLISH, JR., Judge
HONORABLE HARRY A. KRAMER, Judge
HONORABLE ROY WILKINSON, JR., Judge
HONORABLE GLENN E. MENCER, Judge
HONORABLE THEODORE O. ROGERS, Judge
HONORABLE GENEVIEVE BLATT, Judge

Argued: April 5, 1976

OPINION BY JUDGE KRAMER — FILED: February 8, 1977

These cases involve appeals from the granting of summary judgments, or, as in several of the cases, judg-

ments on the pleadings against the appellants. The appellants are residents of, or are domiciled in, the State of New Jersey, but are employed by the Federal Government at federal establishments inside the boundaries of the City of Philadelphia. These appeals are but the latest chapter in the history of litigation which has been unceasing since 1939, when the City first passed its Wage and Net Profits Tax Ordinance.[1]

In each of these cases, the City filed a complaint in assumpsit in the Court of Common Pleas of Philadelphia County. The complaints are all similar. Each alleged that the named defendant had not paid the wage tax for the various years shown on the complaints. Each demanded payment of the delinquent taxes plus interest and penalties, pursuant to Section 19-508(1) of The Philadelphia Code, which provides in pertinent part:

> (1) If any tax imposed under this Title is not paid when due, interest at the rate of ½% of the amount of the unpaid tax and a penalty at the rate of 1% of the amount of the unpaid tax shall be added for each month or fraction thereof during which the tax shall remain unpaid and shall be collected, together with the amount of the tax.

Each defendant filed an answer in which he or she denied certain allegations of the complaint, and, as to the remaining allegations, asserted the privilege against self-incrimination guaranteed by the Fifth Amendment to the United States Constitution. Each answer also contained new matter which alleged that the action was barred by the statute of limitations and that the City's wage tax law was unconstitutional under the Pennsylvania and the United States Constitutions.

After all pleadings procedure had closed, the City moved for judgment on the pleadings in its actions against

1. Philadelphia, Pa., Code, §19-1500 et seq. (1973)

Defendants Thomas, Percival, Kenny, Hazzard, Harvey, and Deckert. Judge Paul A. Dandridge entered orders granting the City's motion. In the actions against Defendants Sproles, Newman, Jennings, Jones, Schock, Goldstein, Cornell, Cilona, and Cross, the City submitted supporting affidavits and moved for summary judgment. The motions in these cases were assigned to six separate judges, who heard and granted the motions. We will affirm the orders of the court below in all 15 of these appeals.

The primary issues raised by the appellants can be summarized as follows: (1) Do the appellants' assertions, in their answers, of the privilege against self-incrimination under the Fifth Amendment to the United States Constitution leave unresolved questions of fact which render judgment on the pleadings or summary judgment inappropriate? (2) Have the appellants adequately denied certain averments of fact in the City's complaint, so as to leave unresolved questions of fact which render judgment on the pleadings or summary judgment inappropriate? (3) Does the doctrine of estoppel for failure to exhaust administrative remedies preclude the appellants from raising, as new matter, the defenses of unconstitutionality of the wage tax ordinance and the running of the statute of limitations? and (4) If the appellants are not precluded from raising the aforementioned defenses, are there any unresolved questions of fact which must be answered before we may rule on the merits of these defenses?

As can be seen, the general thrust of these issues is a challenge to the appropriateness of judgments on the pleadings or summary judgments, as the case may be, for the disposition of these cases. As an appropriate starting point, we note our conclusion that each of the City's complaints contains adequate allegations to support a lawsuit in assumpsit, and, therefore, we are concerned with the legal sufficiency of the appellants' answers thereto. Since the pleadings in all of these cases are similar in all respects material to the application of the relevant legal principles,

quoted portions of the pleadings will be drawn from the action against Guy W. Harvey for illustrative purposes.

I. DO THE APPELLANTS' ASSERTIONS OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION LEAVE UNRESOLVED QUESTIONS OF FACT?

In paragraph 2 of each of the complaints, the City alleged the defendant's name, the name of his or her employer, his or her place of employment, and his or her social security number and account number with the Department of Collections. In paragraph 5 of each complaint, the City alleged the defendant's income for the years in question. Each appellant's answer responded to these averments by an assertion of the privilege against self-incrimination under the Fifth Amendment to the United States Constitution.

It is indisputable that the Fifth Amendment privilege against self-incrimination is applicable to the States via the Fourteenth Amendment, and that it applies to protect an individual not only from being compelled to testify against himself in a criminal prosecution, but also privileges him not to answer official questions in any proceeding, criminal or civil, where the answer might incriminate him in future criminal proceedings. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

In Pennsylvania, pleadings are conclusive in the actions in which they are filed. *Ham v. Gouge*, 214 Pa. Superior Ct. 423, 257 A. 2d 650 (1969). Moreover, in the absence of statutory prohibitions, a party's *voluntary* testimony or statements made in pleadings or other papers filed in a judicial proceeding, may be used against him in a subsequent criminal prosecution. 1 Henry, Pennsylvania Evidence, §82 (4th ed. 1956); *see also Commonwealth v. Ensign*, 228 Pa. 400, 403-4, 77 A. 657, 658 (1910), *aff'd*, 227 U.S. 592 (1912); *Commonwealth v. Cavanaugh*, 159 Pa. Superior Ct. 113, 119, 46 A. 2d 579, 582 (1946);

Charles v. Arrington, 110 Pa. Superior Ct. 173, 177, 167 A. 428, 429 (1933). It follows that a defendant in a civil case must be entitled to assert the privilege in his pleadings, when allegations in the complaint call for answers which may tend to incriminate him. *See de Antonio v. Solomon*, 41 F.R.D. 447 (D.C. Mass. 1966); *Ensign, supra; Cavanaugh, supra*. It must be emphasized, however, that the interdiction of the privilege operates only in situations presenting the possibility of *criminal liability*. *Hale v. Henkle*, 201 U.S. 43, 67 (1906); *Riccobene Appeal*, 439 Pa. 404, 268 A. 2d 104 (1970).

It is clearly the law of Pennsylvania that the prosecution for violation of a municipal ordinance is procedurally a civil case. *e.g., Waynesburg Borough v. van Scyoc*, 419 Pa. 104, 213 A. 2d 216 (1965); *Commonwealth v. Ashenfelder*, 413 Pa. 517, 198 A. 2d 514 (1964); *Philadelphia v. Home Agency, Inc.*, 4 Pa. Commonwealth Ct. 174, 285 A. 2d 196 (1971). In *Philadelphia v. Konopacki*, Pa. Commonwealth Ct. , 366 A. 2d 608 (1976), this Court squarely held that an action for fines for violations of the wage tax provisions of the Philadelphia Code, §19-500 et seq. (1973), is a civil action. This is not dispositive, however, for each appellant has cited the case of *Philadelphia v. Cline*, 158 Pa. Superior Ct. 179, 44 A. 2d 610 (1945), *cert. denied*, 328 U.S. 848 (1946), which held that the defendants in an action in assumpsit for *fines* for failure to file returns under the Philadelphia Wage Tax Ordinance could assert the privilege and refuse to testify, and that no comment could be made upon their silence, nor could any adverse inference be drawn from it. *Cline, supra*, at 184-86, 44 A. 2d at 613. We are of the opinion that *Cline* was correctly decided, but we conclude that the judgments granted below in the present cases do not violate the holding in that case.

The holding in *Cline* rests upon the proposition that actions for penalties, even though prosecuted through modes of procedure applicable to the ordinary civil remedy,

may be "criminal" in their nature for Fifth Amendment purposes, e.g., *United States v. United States Coin and Currency*, 410 U.S. 715 (1971); *Lees v. United States*, 150 U.S. 476 (1893); *Boyd v. United States*, 116 U.S. 616 (1886); *Osborne v. First Nat'l Bank*, 154 Pa. 134, 26 A. 289 (1893); *Boyle v. Smithman*, 146 Pa. 255, 23 A. 397 (1892). As the cited cases point out, in such "quasi-criminal" cases, the Fifth Amendment privilege is fully applicable; the defendant may refuse to testify altogether and no adverse inference may be drawn from such refusal. We agree with the court in *Cline, supra*, that an action for *fines* and *imprisonment*, if said fine is not paid within ten days,[2] is such a "quasi-criminal" case.

However, not all penalties pursued by civil actions are "quasi-criminal". A penalty may be primarily remedial, as opposed to criminal, in character, and, if this is the case, such guarantees of the Fifth Amendment as the prohibition of double jeopardy and the privilege against self-incrimination do not apply. *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 237 (1972); *Rex Trailer Co. v. United States*, 350 U.S. 148, 152 (1956); *United States ex. rel. Marcus v. Hess*, 317 U.S. 537, 548-52 (1943); *Helvering v. Mitchell*, 303 U.S. 391, 398-405, 404n. 12 (1938). The penalty sought in the present cases under Section 19-508(1) is an addition to the appellants' taxes of one percentum per month for each month the tax remains unpaid. Such a sanction is primarily remedial in character. It is provided as a safeguard for the protection of the revenue and to reimburse the City government for the heavy expense of investigations, litigation, and other measures designed to accomplish assessment and collection of taxes necessitated by the taxpayer's failure or refusal to pay that tax. *See Helvering v. Mitchell, supra* at 401. The penalty provided in Section 19-508(1) falls, in our opinion, entirely within the reasoning of the Court in

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2. Philadelphia, Pa., Code §19-508(3) (1973).

Mitchell. It should be noted that the Court in that case, while in the process of concluding that a 50 percentum addition to taxes owed for fraudulent evasion was a purely civil sanction, noted that an addition to the tax of one percentum per month in the case of non-payment was *obviously* intended by a Congress as a civil incident of the assessment and collection of the income tax. *Helvering v. Mitchell, supra,* at 405. We believe it likewise clear that the "penalty" in Section 19-508(1) of this Ordinance was intended by its promulgators as a civil incident of the assessment and collection of the wage tax, and we so hold.

Since we have held the present cases to be completely civil in nature, they *alone* provide no grounds to support the assertion of the privilege by the appellants. However, as pointed out in the briefs, the appellants may well be subjected to future proceedings by the City for fines and imprisonment in default of payment of said fines under Section 19-508(3) for failure to file returns covering the tax liability at issue here. Because of their reasonable apprehension of such "quasi-criminal" proceedings, the appellants were entitled to assert the privilege in these civil cases. *Leftkowitz v. Turley,* 414 U.S. 70, 77 (1973). This does *not* mean, however, that the effect of the privilege is the same as if it had been invoked in a criminal or quasi-criminal case. Although we have discovered no Pennsylvania cases so holding, there is much authority for the proposition that, while a defendant in a civil case may invoke the privilege and it may not be used against him in any way in a *subsequent criminal prosecution,* the court in the *civil case* may draw any adverse inference which is reasonable from the assertion of the privilege. *Kent v. United States,* 157 F. 2d 1 (5th Cir.) *cert. denied,* 329 U.S. 785 (1946); *Paynes v. Lee,* 362 F. Supp. 797 (M. D. La. 1973), *aff'd,* 487 F. 2d 1307 (5th Cir. 1974); *Stillman Pond, Inc. v. Watson,* 115 Cal. 2d 440, 252 Pa. 2d 717 (Ct. App. 1953); *Simpson v. Simpson,* 233 Ga. 17, 209 S. E. 2d 611 (1974); *Allen v. Lindeman,* 259 Iowa 1384, 148 N. W.

2d 610 (1967); *Ralph Hegman Co. v. Transamerica Insurance Co.,* 293 Minn. 323, 198 N. W. 2d 555 (1972); *Morgan v. U. S. Fidelity and Guaranty Co.,* 222 S. 2d 820 (Miss.), *cert. denied,* 396 U.S. 842 (1969); *Harwell v. Harwell,* 355 S.W. 2d 137 (Mo. App. 1962); *Mahne v. Mahne,* 66 N. J. 53, 328 A. 2d 225 (1974); *In Re Tesch,* 322 N.Y.S. 2d 538, 66 Misc. 2d 900 (1971); *Ikeda v. Curtis,* 43 Wash. 2d 449, 261 P. 2d 684 (1953); *Molloy v. Molloy,* 46 Wisc. 2d 682, 176 N.W. 2d 292 (1970); 8 Wigmore, Evidence, §2272(1)(e) (McNaughton rev. 1961); 8 C. J. S. Witnesses, §455. We conclude that the rule enunciated in the cited authorities is sound, and we adopt it. In the present cases, a reasonable inference to be drawn from the appellants' assertion of the privilege is that a truthful response to the relevant allegations of the City's complaint would fail to deny these allegations. *See, e.g., Simpson v. Simpson, supra,* at 21, 209 S. E. 2d at 614; *Molloy v. Molloy, supra,* at 687, 176 S. W. 2d at 687, 176 S. W. 2d at 296. Therefore, we may deem the allegations in paragraphs 2 and 5 of the complaint to be admitted by failure to deny specifically or by necessary implication,[3] and, therefore, the assertion of the privilege leaves *no* unresolved questions of fact which would render judgment on the pleadings or summary judgment inappropriate.

II. ARE THE APPELLANTS' DENIALS OF THE ALLEGATIONS IN PARAGRAPHS 4 AND 6 OF THE COMPLAINT SUFFICIENT TO LEAVE UNRESOLVED QUESTIONS OF FACT?

With the exception of the amount of taxes due, paragraph 4 in the City's complaint against each appellant was identical to that in the case of Guy W. Harvey:

> (4) The defendant(s) has (have) failed to file tax returns and/or to pay to the Department of Collec-

3. Pa. R.C.P. No. 1029(b), 43 Pa. C.S.A.

> tions, the taxes, or the balance of tax due under the aforesaid Ordinances, in the sum of $2,185.14, as more fully set forth in the statement hereto attached, marked Exhibit "A", and made a part hereof, together with interest and penalties as provided by Section 19-508(1) of the Philadelphia Code.

Each appellant responded as follows:

> (4) It is denied that defendant owes the City any sum of money. On the contrary, it is averred that said claim is totally wrong.

In paragraph 6 of each complaint, with insignificant variations, in word order, it was alleged that:

> (6) The City of Philadelphia made assessments from the earnings information supplied to the City of Philadelphia by the Federal Agency, and the defendant was notified of such assessments from which the defendant failed to file a petition for review with the Philadelphia Tax Review Board as permitted under Section 19-702 of the Philadelphia Code.

Each appellant, with one exception,[4] responded in identical fashion:

> (6) Denied. Defendant is without sufficient knowledge or information concerning how the City of Philadelphia made its assessments, although it is believed the City of Philadelphia has no valid basis for making any assessement whatsoever. Strict proof of this allegation is demanded at trial.

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4. Appellant Percival answered these allegations with an assertion of the Fifth Amendment privilege against self-incrimination. He is deemed to admit them, therefore, in accordance with part I of this Opinion.

In their briefs, various of the appellants have argued that the court below erred in concluding that the appellant had admitted, by failing to properly deny under Pa. R.C.P. No. 1029, 42 P.C.S.A., the allegation that the named defendant had failed to file tax returns, had received notice of assessment, and had failed to appeal the assessment to the Tax Review Board. We cannot agree with appellants' contention.

In paragraph 4 of their answers, appellants did not specifically, or by necessary implication, deny the alleged failure to file tax returns. A blanket denial of any liability on the grounds that the City's claim is "totally wrong" cannot, by any stretch of the imagination, be said to necessarily imply a denial of the alleged failures to file returns or to pay the tax. In fact, the only reasonable conclusion we have perceived is that paragraph 4 implies an admission that the named appellant had not paid the tax alleged to be due, a fact expressly admitted in paragraph 7 of each of the answers. Paragraph 4 is, at best, a general denial of the allegation of failure to file tax returns. We agree with the court below that this allegation may be deemed admitted, and we so hold.

The response in paragraph 6 of each of the answers fails to adequately deny the allegations that the named defendant was notified of the tax assessment and failed to seek review before the Tax Review Board. The response is inadequate for several reasons. First, it does not conform to the requirements of Pa. R.C.P. 1029(c) in that it fails to allege either that the named defendant's lack of knowledge and information existed "after reasonable investigation"[5] or that it was attributable to the means of proof being in "the exclusive control of an adverse party or a hostile person".[6] Second, *on its face*, the denial refers only to *how* the City made its assessments; to wit, that the assessments

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5. Pa. R.C.P. No. 1029(c)(1).

6. Pa. R.C.P. No. 1029(c)(2).

were made on the basis of information supplied by the Federal Agency (the employer). It does not specifically deny that the defendant received notice of an assessment or that he failed to appeal to the Tax Review Board. Third, a denial of the just mentioned allegation could not, in any event, be done by way of a demand for proof under Pa. R.C.P. No. 1029(c), because it is clear that, as to whether *he* received notice of the assessment, and whether *he* had appealed to the Tax Board, each defendant had sufficient knowledge on which to base an admission or specific denial. *Medusa Portland Cement Co. v. Marion Coal & Supply Co.*, 204 Pa. Superior Ct. 5, 8, 201 A. 2d 285, 286 (1964). We agree with the court below that the appellants are to be deemed to have admitted to receipt of notice of assessment and failure to appeal to the Tax Review Board, and we so hold.

We pause to note at this point that all of the City's allegations in its complaint have been admitted in one way or another in each answer. Those in paragraphs 1, 3 and 7 are expressly admitted. Those in paragraphs 2 and 5 are deemed admitted as a consequence of the assertion of the Fifth Amendment privilege against self-incrimination (Part I of this Opinion). Finally, those in paragraphs 4 and 6 are deemed admitted for failure to deny in accordance with Pa. R.C.P. No. 1029 (Part II of this Opinion). It remains to be considered whether the allegations under the heading of "new matter" in the appellants' answers raise questions of fact which stand as a bar to judgment on the pleadings or summary judgment.

III. DO THE ALLEGATIONS IN THE APPELLANTS' NEW MATTER RAISE UNRESOLVED QUESTIONS OF FACT?

Under "new matter", each appellant asserted as defenses (1) the unconstitutionality of the Tax Ordinance *as applied* to the defendant, and (2) the bar of the statute of

limitations. The lower court rejected these on two grounds. First, the appellants were held to be precluded from raising these issues for failure to exhaust the administrative remedy provided in the Ordinance. Second, and in the alternative, based on the facts as found in the pleadings and the applicable principles of law, each defense was held to be without merit. We agree with the lower court on both grounds.

The City of Philadelphia Tax Review Board is an administrative agency created by Sections 3-100(f) and 6-207 of The Philadelphia Home Rule Charter. Pursuant to the authority granted by Section 6-207, the City Council enacted the Tax Review Board Ordinance, as codified in the Philadelphia Code, § 19-1700 et seq. Under Section 19-1702(1) of the Code, the Tax Review Board is empowered to hear "[e]very petition for review of any decision or determination relating to the liability of any person for any unpaid money or claim collectible by the Department of Collections including . . . any tax and interest and penalties thereon. . . ." A right of appeal to any court of competent jurisdiction from an adverse decision of the Board is provided for by Section 19-706(2) of the Code.

The Statutory Construction Act of 1972, 1 Pa. C.S. § 1504, provides:

> In all cases where a remedy is provided or a duty is enjoined or anything is directed to be done by any statute, *the directions of the statute shall be strictly pursued*, and no penalty shall be inflicted, or anything done agreeably to the common law, in such cases, further than shall be necessary for carrying such statute into effect. (Emphasis added.)

The Philadelphia Home Rule Charter has the status of an act of the General Assembly. *Addison Case*, 385 Pa. 48, 57, 122 A. 2d 272, 276 (1956). As such, the procedure established by the Charter and the Ordinance passed to

supplement and carry out its provision is a "remedy" subject to the rule of exhaustion prescribed in the Statutory Construction Act. *Philadelphia v. Sam Bobman Department Store Co.*, 189 Pa. Superior Ct. 72, 81-82, 149 A. 2d 518, 523 (1959) (considering the applicability to the ordinance in question of the predecessor act to § 1504 of the Statutory Construction Act). The rule applies to defenses as well as to affirmative actions. *Philadelphia v. Kolb*, 288 Pa. 359, 136 A. 239 (1927); *Philadelphia v. Sam Bobman Department Store Co., supra, Philadelphia v. Dougherty*, 153 Pa. Superior Ct. 554, 34 A. 2d 918 (1943).

The appellants recognize the general rule requiring exhaustion of administrative remedies, but assert that the present cases fall within the exception to the rule which finds its most recent definitive statement in *Borough of Greentree v. Board of Property Assessments*, 459 Pa. 268, 328 A. 2d 819 (1974). We cannot agree.

In *Greentree*, our Supreme Court was presented with a case where three municipalities and numerous individual taxpayers had by-passed the remedy of administrative review provided by statute and brought, in equity, a constitutional challenge going directly to the validity of the statutory assessment scheme applicable to Allegheny County. The Court held that where there is a *substantial constitutional question going directly to the validity* of a statute *and* the statutory remedy is inadequate, a court of *equity* has jurisdiction regardless of the failure to pursue the administrative remedy. Id. at 281-82, 328 A. 2d at 825.

For several reasons, the present cases do not fall within the decision in *Greentree*. First, the appellants have attempted to raise the issue of the constitutionality of the wage tax as a defense to an action on the *law side* of the Common Pleas Court. The Tax Review Board Ordinance, § 19-1700 et seq. of the Philadelphia Code, provides the remedy at law. If it is inadequate and the requisite constitutional issues exist, *Greentree* provides a remedy in equity. Yet appellants are not satisfied. They want a third alternative. They desire to sit back and wait until the City seeks an action in assumpsit for the taxes due, and then be permitted to press the constitutional questions as a defense to the action. This Court will not countenance such a significant erosion of the rule requiring exhaustion of remedies, at least where the case is civil in nature.[7]

Second, in the present cases the appellants have asserted in their pleadings that the Tax Ordinance is unconstitutional *as applied* to the appellants. Thus, we do not have a challenge "going directly to the validity" of the underlying ordinance. Moreover, as we shall demonstrate shortly, most, if not all, of the "grave constitutional questions" arising from the Philadelphia Wage Tax Ordinance have already been decided. *See Rochester & Pittsburgh Coal Company v. Indiana County Board of Assessment and Revision of Taxes*, 438 Pa. 506, 509, 266 A. 2d 78, 79 (1970). Thus, we are of the opinion that even if these were equity actions brought by appellants, the constitutional issues which they seek to raise would be barred by appellants' failure to exhaust their administrative remedies. *Rochester, supra.*

Third, unlike the very specific allegations of unconstitutionality made in the pleadings in *Greentree*,[8] the appellants have merely averred that "The Tax Ordinance as applied to the Defendants is unconstitutional and in violation of both the State and Federal Constitutions." The Pennsylvania Supreme Court, in *Rochester* at 506, 266 A. 2d at 79, made it clear that, to confer jurisdiction on an equity court, there must be the absence of an adequate statutory remedy and the existence of a clear and obviously substantial question of constitutionality. A "mere allega-

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7. We agree with the Court in *McKart v. United States*, 395 U.S. 185 (1969) that, under particular circumstances, application of the exhaustion rule to bar a defense in a criminal prosecution may not be proper.

8. 459 Pa. at 272, 328 A. 2d at 821.

tion" of unconstitutionality is not sufficient. Even if the *Greentree* exception to the exhaustion rule could be applied to defenses in actions on the law side, we conclude that the threshoid requirements would be no less and that the bare allegation of unconstitutionality by appellants is not sufficient to set forth a "substantial question of constitutionality".

Finally, the court in *Greentree* justified the exercise of equitable jurisdiction on the grounds that "the more direct the attack on the statute, the more likely it is that exercise of equitable jurisdiction will not damage the role of the administrative agency charged with enforcement of the act, nor require, for informed adjudication, the factual fabric which might develop at the agency level." 459 Pa. at 281, 328 A. 2d at 825. Under the facts and procedure presented to us in these cases, we hold that an informed adjudication of appellants' nebulous assertion of unconstitutionality of the tax as applied and their raising of the bar of the statute of limitations would best be arrived at by the development of a factual record at the agency level. The Tax Board itself could have then applied those facts to the period of limitations in the Ordinance and, subject to judicial review of the legal issue, determined whether the claims were barred. While the Tax Board may be without power to determine the constitutional questions,[9] the court called upon to make such determinations is relieved of the burden of building the factual record itself.

We hold that the appellants' failure to exhaust the administrative remedy of review by the Tax Board (a fact held previously to be admitted in the pleadings) precludes

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9. It is clear that an agency is without power to determine the constitutionality of its enabling legislation. *Greentree* at 281, 328 A. 2d at 825; *Philadelphia Life Insurance Co. v. Commonwealth*, 410 Pa. 571, 580, 190 A. 2d 111 (1963). It is not clear whether an agency is without power to rule on any constitutional question. We need not decide that question here, and we leave it for resolution when we are squarely faced by it.

the raising of the defenses of unconstitutionality of the tax as applied and the bar of the statute of limitations.

Assuming in the alternative, as did the court below, that the appellants' defenses are not precluded by the exhaustion rule, we are of the opinion that they are without merit. The constitutionality of the Philadelphia Wage Tax has been subject to continuing challenge over its nearly 37-year history under both the Pennsylvania and the United States Constitutions. Most of these challenges have been by New Jersey residents working in federal establishments in Philadelphia. They have been brought in both state and federal courts. The tax has been attacked from almost every conceivable angle: as violating due process, equal protection, uniformity, and federal immunity; as infringing upon the privilege against self-incrimination; as unreasonably burdening interstate commerce; as impairing the obligation of contract; and as offending the privileges and immunities clause. Yet in each instance the tax has passed constitutional muster. *Non-Resident Taxpayers Ass'n. v. Murray*, 347 F. Supp. 399 (E.D. Pa.), *aff'd*, 410 U.S. 919 (1972); *Non-Resident Taxpayers Ass'n. v. Philadelphia*, 341 F. Supp. 1139 (E.D. Pa. 1971), *aff'd*, 478 F. 2d 456 (3d Cir. 1973); *In Re Thompson*, 157 F. Supp. 93 (E.D. Pa. 1957) *aff'd* sub nom. *United States ex rel Thompson v. Lennox*, 258 F. 2d 320 (3d Cir. 1958), *cert. denied*, 358 U.S. 931 (1959); *Kiker v. Philadelphia*, 346 Pa. 624, 31 A. 2d 289, *cert. denied*, 320 U.S. 741 (1943); *Dole v. Philadelphia*, 337 Pa. 375, 11 A. 2d 163 (1940); *Philadelphia v. Cline*, 158 Pa. Superior Ct. 179, 44 A. 2d 610 (1945), *cert. denied*, 328 U.S. 848 (1946); *Philadelphia v. Schaller*, 148 Pa. Superior Ct. 276, 25 A. 2d 406, *cert, denied*, 317 U.S. 649 (1942).

For many years New Jersey residents who are federal employees within the boundaries of Philadelphia have been fighting to evade, or avoid, or find sanctuary from their responsibility as users of the services provided by the City of Philadelphia by fighting and not paying a wage tax

which was first applied to this non-resident class in 1942.[10] It took Acts of Congress and opinions of the Supreme Courts of both the federal and the state judiciary to resolve the issue of the authority of Philadelphia to tax wages earned inside its city limits. All of that is behind us now. Yet these same constitutional questions are still mentioned in the briefs in the appeals currently before us, apparently in the hope that some appellate court somewhere will change the law. That is not likely to happen, and it will not happen in this case. Suffice it to say that questions of the constitutionality of the Philadelphia Wage Tax Ordi-

10. Having just witnessed the Bicentennial year, when the people of New Jersey and Pennsylvania as well as the people of their sister States have so genuinely shown concern for one another, it is ironic that these cases continue on in what this writer believes to be a frivolous and vexatious manner. There is no question that there have been serious constiutional questions, but they have been resolved many years ago, and yet, many New Jersey residents who desire, understandably, to avoid any more taxation are still attempting to take all the benefits they can wring out of the City of Philadelphia without paying for same. This writer need not go into a litany of beneficial services provided by the City. It is sufficient to point to the provision of health care, fire and police protection, to the use of the streets, sewers, water, and other utilities; to the use of Philadelphia's hospitals, universities, colleges, museums, aviaries, libraries, zoo, and conservatory, none of which facilities pay taxes. Enough is said concerning the benefits that the New Jersey residents are unfairly reaping at the expense of the Philadelphia taxpayers. In 1977 most reasoning adults who have any familiarity with the front pages of their respective newspapers know that large metropolitan areas, especially cities like Philadelphia and New York, are close to bankruptcy because of the high cost of everything. Inflation hits government as well as it hits the private citizen. The people of this country must come to realize that in order to save the cities, which perform functions which make this country work, the cities cannot continue to provide services to non-residents without some kind of compensation. To hold otherwise would be to fail to realize that municipal overburden is one of the most important defects in the operation of local governments in this country.

nance and its application to non-residents of the City working within Philadelphia have long since been put to rest, and we will not exhume those issues merely to verify that they are dead.

The attempt by the appellants to raise the bar of the statute of limitations provides several more instances of frivolous argument.

Section 19-509 of the Philadelphia Code, in pertinent part, provides:

> Any suit to recover any tax imposed by this Title, other than real estate and personal property taxes, shall be begun within 6 years after such tax is due or within 6 years after the return or report has been filed, whichever date is later; but this limitation shall not apply in the following cases;
> (a) Where the taxpayers failed to file the return or report required under the provisions of this Title;

All of the appellants raise the bar of the six-year limitations period in their pleadings, and all except Percival raise the issue on appeal. Yet of the 15 actions before us, 10 are not even arguably barred by the limitations period. Actions against Hazzard and Percival were commenced on January 4, 1973 for the tax years 1968 to 1971. Actions were commenced on November 15, 1973 against Jones and Cross for tax years 1968 to 1972; against Schock, Cornell and Cilona for tax years 1970 to 1972; and against Newman, Jennings, and Goldstein for tax years 1971 and 1972. As to the above appellants, the claim of the bar of the statute of limitations is a flagrantly unfounded defense.

With regard to remaining appellants, we reject the argument that the receipt by the City of earnings information covering appellants from their federal employers caused the six-year statute to begin running. Section 19-509 imposes the duty to file a return or report upon the *taxpayer*. None of the appellants have done so. Taxation

throughout the United States relies heavily on the assumption that each taxpayer will voluntarily and honestly file the relevant reports and pay the amount of tax legally due. To accept the appellants' argument would be to effectively impose upon the Philadelphia taxing authorities the tremendous burden of collating information received from employers to derive the total taxable earnings from all sources for persons subject to the local wage tax who refuse or fail to file returns. This we will not do. The case of *Philadelphia v. Litvin*, 211 Pa. Superior Ct. 204, 235 A. 2d 157 (1967), cited by appellants, is not apposite. In *Litvin*, the taxing authorities had *fully audited* the taxpayers' records. We agree that a full audit by the taxing authorities fully serves the purposes behind requiring the filing of a tax return and that the statute of limitations runs from the date of the audit. However, an earnings report elicited from an employer is not the equivalent of a full audit of the taxpayer's records, and we conclude it is not sufficient to start the running of the statute.

IV. DID DENIAL OF ORAL ARGUMENT ON THE MOTION FOR JUDGMENT ON THE PLEADINGS VIOLATE RULE 211 OF THE PENNSYLVANIA RULES OF CIVIL PROCEDURE?

There remains for resolution one issue raised *solely* by Appellant Percival: Whether the lower court violated Rule 211 of the Pennsylvania Rules of Civil Procedure by granting a motion for judgment on the pleadings without allowing oral argument as requested by both parties?

In pertinent part, Pa. R.C.P. No. 211, 42 Pa. C.S.A. provides:

> *Oral Argument.*
>
> Any party or his attorney shall have the right to argue any motion and the court shall have the right to require oral argument. With the approval of the court oral argument may be dispensed with by agreement of the attorneys and the matter submitted to the court either on papers filed of record, or such briefs as may be filed by the parties. . . .

On July 31, 1963, the Pennsylvania Supreme Court adopted rules governing "The Business of the Courts in the First Judicial District". Rule IV provides, inter alia:

> IV. — In exercising the administrative supervision prescribed under III over civil, equity, and criminal practice and procedure, the Administrative Judge shall have the following general powers for facilitating the speedy and proper administration of justice in those courts.
>
> . . . .
>
> D. To provide for, establish and maintain a consolidated motion list . . . and in addition to provide and establish procedures necessary and proper to implement these practices.
>
> . . . .
>
> H. To make rules and regulations and do any and all things necessary and proper to carry out the purposes and intent of the general powers granted to the Administrative Judge herein.

Pursuant to this grant of powers, the President Judge of the Common Pleas Court of Philadelphia County promulgated general court regulation No. 71-12, effective August 23, 1971. Among its other provisions, regulation no. 72-12 granted to Motion Judges the discretion to grant or deny requests for oral argument.

There are no court decisions on the issue of whether 211 is a qualified or unqualified right to oral argument. However, in his discussion of Rule 211, Anderson states:

> Rule 211 gives every party or his attorney a *qualified* right to make an oral argument on any motion. The

> court by local rule may regulate the length of time of such arguments. *In a given case the local court may also dispense with oral argument if it so desires and dispose of the case on the record or upon briefs.* The parties may also waive oral argument unless it is required by the court. 1 A. Anderson, Pennsylvania Civil Practice §211.1 (third edition 1975). (Emphasis added.)

We are of the opinion that Rule 211 was not intended to compel a Motion Judge to allow pointless oral argument. We think the grant of discretion in general court regulation 21-72, which allows a Motion Judge to deny oral argument when it would serve no useful purpose, is valid. We also note at this point that the appellant did not, until this appeal, object to the grant of discretion in Regulation 21-72. In any event, exercise of that discretion is subject to appellate review.

Appellant Percival insists that his case is sufficiently different from the other appeals before us so that judgment on the pleadings would not have been granted if he had been given the opportunity for oral argument. The only difference which we can discover lies in the fact that Percival answered the City's allegations regarding the making of an assessment, the receipt of notice of same by appellant, and his failure to appeal to the Tax Review Board, by an assertion of the privilege against self-incrimination instead of by a demand for proof. In view of parts I and II of this Opinion, this difference is not material; either form of answer is deemed an admission. We find no abuse of discretion in the denial of oral argument.

CONCLUSION

Based upon the reasoning and conclusions in Parts I, II and III of this Opinion, it is the conclusion of this Court that the pleadings in these 15 cases leave no questions of unknown or unresolved material fact and that trial on the merits would be a fruitless exercise. The granting of motions for judgment on the pleadings, in those cases where such motions were made, was proper. As for those cases involving the granting of summary judgment, we find nothing in the City's affidavits which would detract from or conflict with the pleadings in those cases. Therefore, we hold the granting of summary judgment in those cases to be likewise proper. We affirm the judgments of the court below.

/s/

Harry A. Kramer, Judge

Appendix B

CITY OF PHILADELPHIA
v.
JEROME L. NEWMAN
1020 Abington Road
Cherry Hill, New Jersey
C/O DEFENSE PERSONNEL CENTER
20th & Johnston Streets
Philadelphia, Pennsylvania

COMMON PLEAS COURT
TRIAL DIVISION

NOVEMBER TERM, 1973

No. 2040

Complaint In Assumpsit

(1) The Plaintiff is the City of Philadelphia, a City of the First Class in the Commonwealth of Pennsylvania, acting through its Department of Collections.

(2) The Defendant is Jerome L. Newman, an individual who at all times hereinafter mentioned was employed by the Defense Personnel Center, 20th & Johnston Streets, Philadelphia, Pennsylvania, whose social security number is 133-18-2812 and who was assigned account number 77-6732448 by the Department of Collections.

(3) The Council of the City of Philadelphia adopted the following Ordinances imposing taxes for general revenue purposes, the provisions of which are incorporated herein by reference:

Wage and Net Profits Tax Ordinance, December 13, 1939, later amended, now Section 19-1500 of the Philadelphia Code.

(4) The defendant has failed to file tax returns and/or to pay to the Department of Collections, the taxes, or the balance of taxes due under the aforesaid Ordinances, in the sum of $971.35, as more fully set forth in the statement hereto attached, marked Exhibit "A", and made a part hereof, together with interest and penalties as provided by Section 19-508(1) of The Philadelphia Code.

(5) The Defendant had reported earnings of $15,309.00 in 1971 and $16,278.00 in 1972.

(6) Based on information supplied by the Federal Agency to the Department of Collections of the City of Philadelphia, assessments were made and the Defendant was duly notified of such assessments from which the Defendant failed to file a Petition for Review with the Philadelphia Tax Review Board as permitted under Section 19-1702 of The Philadelphia Code.

(7) The Plaintiff has made demands upon the defendant for the payment of said sums but the defendant has failed to pay the same or any part thereof.

WHEREFORE, the Plaintiff demands judgment against the defendant for the sum of $971.35, together with interest and penalties as provided by Section 19-508(1) of The Philadelphia Code.

/s/

Albert J. Persichetti
Deputy City Solicitor

Martin Weinberg
City Solicitor
Attorneys for Plaintiff

COMMONWEALTH OF PENNSYLVANIA
: ss
COUNTY OF PHILADELPHIA

P. M. Egan being duly sworn according to law deposes and says that he is the Chief of Sanctions, in the Department of Collections for the City of Philadelphia, the plaintiff above named, that he is authorized to make this affidavit, and that the facts set forth in the foregoing Complaint are true and correct.

/s/

Sworn to and subscribed :
before me this 9th day :
of November, 1973.

Notary Public

Delinquent Tax Billing	**CITY OF PHILADELPHIA** **DEPARTMENT OF COLLECTIONS** **ENFORCEMENT DIVISION**
NAME *(Last)* *(First)* *(Middle)* Newman Jerome L. ADDRESS (No. & Street) (City) (Zone) (State) 1020 Abington Road, Cherry Hill, New Jersey	***NOTE*** **77-6732448** ***Interest and Penalty on the billing has been computed as of***

YEAR	TYPE OF TAX	TAX DUE		INTEREST & PENALTY		TOTAL	
1971	Earnings	432	13				
1972	Earnings	539	22				
TOTAL		$971.35				**Exhibit A**	

Make Check Payable to "City of Philadelphia". Do Not Remit Cash By Mail. Postage Not Acceptable